

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN JOSE DIVISION

DEBORAH E. JOHNSON AND GERALD)
D. JOHNSON,)

Plaintiffs,)

v.)

FIRST FEDERAL BANK OF)
CALIFORNIA,)

Defendant.)

Case No.: C 08-0264 PVT

[and related case C 08-01796 PVT]

**ORDER GRANTING DEFENDANT
FIRST FEDERAL BANK'S MOTION
TO DISMISS THE SECOND
AMENDED COMPLAINT**

[Docket No. 40]

INTRODUCTION

Following dismissal of the first amended complaint with leave to amend only their fraud and RICO claims, plaintiffs Deborah E. Johnson and Gerald D. Johnson proceeding *pro se* timely filed their second amended complaint. (collectively "plaintiffs"). Defendant First Federal Bank of California ("Bank") moves to dismiss the second amended complaint for failure to state a claim. Following an order to show cause why plaintiffs had not filed an opposition to the motion to dismiss, plaintiffs filed their opposition on October 31, 2008.¹ Order to Show Cause dated October 2, 2008. ("OSC"). On November 18, 2008, the parties appeared for hearing. Having reviewed the

¹ Originally, defendant Bank noticed the hearing on its motion to dismiss for October 7, 2008. Pursuant to Civ. L.R. 7-3, plaintiffs' opposition was due no later than September 16, 2008. An order to show cause why plaintiffs had not filed an opposition to the motion to dismiss was scheduled for hearing on November 18, 2008. Two weeks prior to the hearing, plaintiffs inexplicably filed their opposition. Despite plaintiffs' untimely filing of their opposition to the motion to dismiss the second amended complaint, the court has considered their opposition.

1 papers and considered the arguments of plaintiffs and counsel for defendant Bank and for the
2 reasons set forth below, defendant Bank's motion to dismiss the second amended complaint is
3 granted.² Plaintiffs' claims are dismissed with prejudice.

4 **BACKGROUND**

5 Plaintiffs Deborah E. Johnson and Gerald D. Johnson are married and have resided at 2nd
6 Avenue 2NE of Dolores Street in Carmel By the Sea since 1995. ("residence"). Plaintiffs estimate
7 the residence has a current market value of \$1.35-1.4 million.

8 In or around February 27, 2005, existing liens on the residence totaled \$776,000 which
9 caused plaintiff Deborah E. Johnson and her mortgage broker, J. Michael Galloway of Pacific
10 Mortgage Consultants, Inc., to undertake efforts to obtain a loan on the residence. Mr. Galloway
11 submitted two loan applications identifying plaintiff Deborah E. Johnson as the sole borrower and a
12 letter verifying her employment at The Care Financial Group to defendant Bank. In the second loan
13 application, plaintiff Deborah E. Johnson listed her monthly income as \$27,500. As attorney to
14 plaintiff Deborah E. Johnson, plaintiff Gerald D. Johnson executed the second Uniform Residential
15 Loan Application on her behalf.³ Based on the two loan applications and various accompanying
16 documents, defendant Bank approved the loan and provided a notice of right to cancel to plaintiff
17 Deborah E. Johnson alone which was valid until midnight of the third business day following the
18 close of escrow. Escrow closed on May 5, 2005.

19 Prior to the close of escrow however, both plaintiffs were named as borrowers on the
20 preliminary loan papers. Because of unsecured debt totaling \$109,552, plaintiff Gerald D. Johnson
21 alleges that his name was removed from the loan papers at the close of escrow to facilitate final
22 approval of the loan. Notwithstanding removal of his name however, plaintiff Gerald D. Johnson
23 alleges that his annual income of \$155,000 was included on the loan papers. Indeed, plaintiffs now
24 allege that plaintiff Deborah E. Johnson had no income whatsoever from January through June 2005.

25
26 ² The holding of this court is limited to the facts and particular circumstances underlying
the present motion.

27 ³ Based on a power of attorney executed by Deborah E. Johnson on April 20, 2005,
28 plaintiff Gerald D. Johnson was appointed as her attorney in fact and was authorized to act on her behalf
with respect to the residence. He was not listed as a co-borrower on either of the two loan applications
submitted to the bank.

1 Plaintiff Gerald D. Johnson also executed a quitclaim to the residence at the close of escrow to
2 further facilitate final approval of the loan.

3 Plaintiff Gerald D. Johnson executed the final loan documents on behalf of his wife at the
4 close of escrow. Later that same day, plaintiff Gerald D. Johnson forwarded to defendant Bank a
5 notice of the right to cancel on behalf of his wife in his capacity as her counsel. Specifically, he
6 stated that “[a]fter our complete review of the loan conditions, we are sorry to say that the loan
7 conditions fail to meet the present financial need for my daughter’s education, we will continue to
8 review other options.” On May 8, 2008, plaintiff Gerald D. Johnson (again) on behalf of his wife
9 rescinded the notice of right to cancel. He stated that “[w]e have decided to proceed with the closing
10 of the loan and escrow on the previous terms.” In the second amended complaint, plaintiffs allege
11 that the defendant and an agent convinced them to proceed with the loan because removal of Gerald
12 D. Johnson’s name was necessary to facilitate the loan and was a “common business practice.”
13 Thereafter, defendant Bank funded the loan on the residence and subsequently remitted payment
14 totaling \$16,800 to the mortgage broker, Mr. Galloway.

15 The loan for an amount totaling \$840,000 apparently included onerous lending terms such as
16 a high pre-payment penalty and high monthly payments (apparently without any payment toward the
17 principal). Plaintiffs believed that the interest rate for the mortgage would remain fixed at 5.7
18 percent for three years. Based on the actual loan and other accompanying documents, plaintiffs
19 allege that defendant Bank engaged in predatory lending practices knowing that plaintiffs could
20 never meet their obligations under the loan. Beginning in or around May 23, 2007, plaintiff
21 Deborah E. Johnson failed to remit any further monthly payments on the loan.⁴

22 On July 11, 2007, defendant Bank sought to exercise its power of sale and recorded a notice
23 of default and election to sell under deed of trust. (“NOD”). On October 16, 2007, a notice of
24 trustee’s sale scheduled for November 8, 2007 was posted at the residence, mailed to plaintiffs and
25 published in the local newspaper.

26
27 ⁴ In plaintiffs’ opposition, they refer to irregularities related to insurance coverage on the
28 residence and overcharges thereon. First, such irregularities were not alleged in the second amended
complaint. Second, based on the documentation accompanying plaintiffs’ opposition, the alleged
overcharges were removed by the bank after proof of insurance on the residence was later shown.
Opposition to Motion to Dismiss Plaintiffs’ Second Amended Complaint, Exhibit D, page 7.

1 On November 7, 2007, plaintiff Deborah Johnson filed an individual chapter 13 bankruptcy
2 petition. In the various schedules accompanying her petition, the residence was identified as an
3 asset of her estate and the loan from the bank was identified as her liability. Gerald Johnson was not
4 identified as a co-debtor on the loan whatsoever. As a result of the bankruptcy filing, the trustee's
5 sale was postponed until February 8, 2008. On January 11, 2008, Deborah Johnson sought to
6 convert her chapter 13 case to a chapter 7 case. On January 16, 2008, defendant Bank filed a motion
7 for relief from the automatic stay to allow the bank to proceed with foreclosure of the residence.
8 The bankruptcy case was later dismissed for failure of Deborah Johnson to provide proper
9 documentation of her current monthly income.

10 On November 16, 2007, plaintiff Gerald D. Johnson filed a chapter 7 bankruptcy petition.
11 His bankruptcy case was later dismissed for failure to file any of the proper schedules.

12 On February 8, 2008, defendant Bank proceeded with the non-judicial foreclosure. The
13 trustee's deed upon sale was completed and recorded on February 12, 2008.

14 As of the petition date, the unpaid balance on the loan totaled \$962,311.64. A second
15 mortgage on the residence held by National City totals \$176,407.64. Defendant Bank estimates that
16 encumbrances on the residence exceed its current market value of \$1,050,000.

17 On January 15, 2008, plaintiffs filed a complaint alleging predatory lending violations,
18 including violations of the Truth in Lending Act, 15 U.S.C. section 1601 *et seq.*, as amended by the
19 Home Ownership and Equity Protection Act. On March 10, 2008, defendant's motion to dismiss
20 was granted with leave to amend. On April 1, 2008, plaintiffs filed their first amended complaint.

21 On April 17, 2008, defendant Bank moved to dismiss the first amended complaint. On July
22 8, 2008, defendant's motion to dismiss was granted with leave to amend only the fraud and RICO
23 claims. In sum, the court found that plaintiff Gerald Johnson did not have standing to assert
24 violations of the Truth in Lending Act and rescission and that plaintiff Deborah Johnson's claims
25 related to violations of the Truth in Lending Act were time-barred. On August 7, 2008, plaintiffs
26 filed their second amended complaint.

27 On August 25, 2008, defendant Bank moved to dismiss the second amended complaint.
28 Plaintiffs failed to timely file an opposition to the motion and the court issued an order to show
cause

1 why no opposition had been filed. Approximately two weeks before the show cause hearing,
 2 plaintiffs filed their opposition to the motion on October 31, 2008 and failed to provide any
 3 explanation for their delayed filing.

4 **LEGAL STANDARD**

5 As previously set forth in orders dated March 10, 2008 and July 8, 2008, the following
 6 standards apply in a motion to dismiss. A complaint may be dismissed for failure to state a claim
 7 upon which relief can be granted. Fed. R. Civ. P. 12(b)(6). The dismissal may be based on either
 8 the
 9 lack of a cognizable legal theory or the absence of sufficient facts under a cognizable legal theory.
 10 *Balistreri v. Pacifica Police Dept.*, 901 F.2d 696, 699 (9th Cir. 1990) and *Robertson v. Dean Witter*
 11 *Reynolds, Inc.*, 749 F.2d 530, 533-534 (9th Cir. 1984). For purposes of evaluating a motion to
 12 dismiss, the allegations in a complaint are taken as true and construed in the light most favorable to
 13 the nonmoving party. *Parks School of Business, Inc. v. Symington*, 51 F.3d 1480, 1484 (9th Cir.
 14 1995). “A complaint should not be dismissed unless a plaintiff could prove no set of facts in support
 15 of his claim that would entitle him to relief.” *Id.* Generally, a motion to dismiss for failure to state a
 16 claim is viewed with disfavor and rarely granted. *Gilligan v. Jamco Develop. Corp.*, 108 F.3d 246,
 17 249 (9th Cir. 1997).

18 However, mere conclusions couched in factual allegations are not sufficient to state a cause
 19 of action. *Papasan v. Allain*, 478 U.S. 265, 286 (1986). *See also, McGlinchy v. Shell Chem Co.*,
 20 845 F.2d 802, 810 (9th Cir, 1988). The complaint must aver “[f]actual allegations [] enough to raise
 21 a right to relief above the speculative level.” *Bell Atlantic Corp. v. Twombly*, 500 U.S. -, 127 S.Ct.
 22 1955, 167 L.Ed.2d 929 (2007) (abrogating *Conley v. Gibson*, 355 U.S. 41 (1957)). “[L]eave [to
 23 amend] shall be freely given when justice so requires.” Fed. R. Civ. P. 15(a). Additionally, a
 24 federal court may liberally construe the “inartful pleading” of parties appearing *pro se*. *Hughes v.*
 25 *Rowe*, 449 U.S. 5, 9, 101 S.Ct. 173, 176 (1980).

26 **DISCUSSION**

27 **I. Fraud Claims**

28 Under California law, the elements of fraud are (1) misrepresentation (false representation,
 concealment or nondisclosure); (2) knowledge of falsity (“scienter”); (3) intent to defraud, i.e., to

1 induce reliance; (4) justifiable reliance; and (5) resulting damage. *Barrier Specialty Roofing &*
2 *Coatings, Inc.*, 2008 WL 1994947 (E.D. Cal.). Under Rule 9(b), a party alleging fraud must state
3 with particularity the circumstances constituting fraud or mistake. Fed. R. Civ. P. 9(b). “Malice,
4 intent, knowledge and other conditions of a person’s mind may be alleged generally.” *Id.*

5 In the second amended complaint, plaintiffs generally allege that defendant “committed at
6 least 4 related acts of fraud with misrepresentations, misstatements and omissions in creating and
7 funding a fraudulent contract and foreclosure transfer.” Plaintiffs allege that defendant “used bank
8 funds in a scheme to defraud plaintiffs and a financial institution for money and property on two
9 counts, funding the loan at inception and in the foreclosure process and transfer [and] [d]efendant’s
10 actions have occurred over a 30 month period and resulted in the taking of money, real and personal
11 property by fraud.”

12 More specifically, plaintiffs allege that at the close of escrow Gerald D. Johnson sought to
13 rescind the loan “but [was] called by Defendant and agent working on behalf of the Defendant, PMC
14 Mortgage, and convinced that the removal of Gerald D. Johnson, was necessary to receive a
15 ‘favorable loan with his credit score’ and [was] a ‘common business practice.’” Plaintiffs also allege
16 that “[p]laintiffs in reasonable reliance on the Defendant’s statement, cancelled the rescission.”

17 In or about and between April 23, 2007 through June 18, 2007, plaintiffs further allege that
18 they made repeated efforts to confirm with the bank the outstanding balance due on the loan.
19 Defendant represented to plaintiffs that payments in the following amounts were due: (1) \$3,930.89;
20 (2) \$16,237.82; (3) \$13,102.77; (4) \$16,472.66; and (5) \$14,635.94. Plaintiffs allege that defendant
21 Bank repeatedly misrepresented to them the outstanding balance due on the loan which hampered any
22 efforts to refinance the loan and caused them to list the residence for sale in July 2007. Additionally,
23 plaintiffs allege that defendant Bank misrepresented the outstanding balance due on the loan in
24 various filings made in the bankruptcy court. These misrepresentations enabled the bank to later
25 foreclose on their residence.

26 Plaintiffs further allege that documents related to the foreclosure and handled by T.D. Service
27 Company were fraudulent and invalid because some of the documents referenced Deborah Johnson
28 as the only trustor and other documents referenced both plaintiffs. Finally, plaintiffs allege that

1 another company working with the defendant and involved in the eviction process charged additional
2 storage fees in violation of an eviction order.

3 First, the facts surrounding rescission of the loan fail to state a claim for fraud. Even
4 assuming that an agent or the defendant called Gerald D. Johnson and informed him that removal of
5 his name was necessary to facilitate the loan, the statement has not been shown to be false. Indeed,
6 following removal of Gerald D. Johnson's name, the loan was funded. *See, e.g., Barrier Specialty*
7 *Roofing & Coatings, Inc. v. ICI Paints North America, Inc.*, 2008 WL 1994947 (E.D. Cal.) ("The
8 statement in question must be false to be fraudulent."). After the final loan papers were signed at the
9 close of escrow, plaintiffs alleged in the second amended complaint that they represented to
10 defendant that they sought to rescind the loan because it would not meet their needs to finance their
11 daughter's education. Thereafter, plaintiffs voided the rescission. As such, based on plaintiffs' own
12 allegations, they did not rely on defendant's representations. Therefore, the first and fourth elements
13 to establish a claim for fraud have not been met.

14 Second, plaintiffs allege that the varying amounts allegedly owed and represented to them as
15 being owed between April 23, 2007 through June 18, 2007 were fraudulent. However, plaintiffs have
16 not alleged sufficient facts to show that the amounts represented by defendant Bank were false or
17 otherwise fraudulent, just that they varied over an approximate two month period and that late fees
18 totaled more than \$50,000 (compared to more than \$29,000 in principal payments due). That the
19 alleged amounts varied over an approximate two month period and that the late fees attendant to the
20 monthly fees were exorbitant does not constitute sufficient facts to show that the amounts owed by
21 plaintiffs were misrepresented to them. Therefore, the first element of a claim for fraud has not been
22 met here.

23 Third, plaintiffs fail to allege sufficient facts related to the mortgage documents to establish a
24 claim for fraud. At least two documents "handled" by T.D. Service Company and related to
25 foreclosure of the residence referenced the outstanding loan as "49792970/Johnson." A third
26 document (Notice of Trustee's Sale) and a fourth document (Trustee's Deed Upon Sale) referenced
27 the loan as "49792970/Johnson/Johnson" which plaintiffs allege reflect the recording of a false
28 document in violation of California law. Plaintiffs allege that the subsequent reference to two

1 Johnsons evidences a false mortgage application submitted on February 27, 2008. A reference in
2 certain documents to two Johnsons (versus one Johnson) fails to state with particularity the
3 circumstances constituting fraud. Moreover, the mortgage application was submitted by plaintiffs
4 themselves.

5 Plaintiffs further fail to allege the relationship between defendant Bank and T.D. Service
6 Company (not a named defendant in the above-captioned action). Additionally, plaintiffs'
7 speculation that discovery will yield further evidence of fraud is insufficient. *See Bell Atlantic Corp.*
8 *v. Twombly*, - U.S. -, 127 S.Ct. 1955, 1965, 1975 (2007). (“[f]actual allegations must be enough to
9 raise a right of relief above the speculative level . . . on the assumption that all the allegations in the
10 complaint are true (even if doubtful in fact.”).

11 Fourth, plaintiffs fail to state facts sufficient to state a claim for fraud relating to additional
12 storage fees in violation of an eviction order. Plaintiffs provide only conclusory allegations that the
13 alleged overcharges constitute fraud. As stated above, Rule 9(b) requires a party to plead the facts
14 with particularity. Accordingly, all of the fraud claims set forth above are dismissed with prejudice.

15 **III. RICO Claims**

16 Plaintiffs have also alleged a RICO claim. 18 U.S.C. § 1964(c) provides a private cause of
17 action for RICO violations. *Virden v. Graphics One*, 623 F.Supp.1417, 1421 (C.D. Cal. 1986). To
18 allege a RICO claim, plaintiff must establish the following: (1) defendant participated in conduct; (2)
19 of an enterprise; (3) through a pattern; (4) of racketeering activity. *Id.* at 1430 (*citing Sedima,*
20 *S.P.R.L. v. Imrex Company, Inc.*, 473 U.S. 479, 105 S.Ct. 3275 (1985)). “[A] pattern of racketeering
21 activity ‘requires at least two acts of racketeering activity.’” *Sedima, S.P.R.L. v. Imrex Company,*
22 *Inc.*, 473 U.S. at 496, fn. 14.

23 In the second amended complaint, plaintiffs allege that defendant Bank “utilized bank funds
24 in funding a loan to the plaintiffs that the plaintiffs did not qualify for [and that] Defendant did this
25 with the intent to take the property through foreclosure.” Plaintiffs further allege that the fraudulent
26 property transfer was completed utilizing bank funds in the foreclosure process and purchase.”
27 Plaintiffs also allege that defendant made material misstatements and misrepresentations to plaintiff
28 and the court about the actual amount owed on the loan.

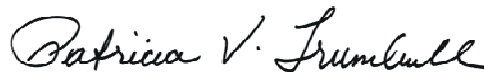
1 As an initial matter, plaintiffs have not alleged sufficient facts to establish a pattern of
2 racketeering activity. Presumably, the alleged acts of fraud constitute the “pattern” of racketeering
3 activity. However, allegations that defendant may have funded a loan for which plaintiffs were
4 unqualified, that defendant made misrepresentations about the amounts due on the loan and that the
5 defendant later foreclosed on the property do not establish the pattern required to allege a RICO
6 claim. Leave to amend would not cure defects in the facts that are necessary to assert such a claim.
7 Accordingly, defendant Bank’s motion to dismiss this claim is granted with prejudice.

8 CONCLUSION

9 For the foregoing reasons, defendant Bank’s motion is granted. Plaintiffs’ fraud and RICO
10 claims are dismissed with prejudice. Judgment shall be entered in favor of the defendant. The case
11 management conference scheduled on December 2, 2008 is vacated. The clerk shall close the above-
12 captioned and consolidated case numbers.

13 IT IS SO ORDERED.

14 Dated: *November 26, 2008*



16 PATRICIA V. TRUMBULL
17 United States Magistrate Judge
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1 Copies of this order were mailed to the following:

2 Deborah E. Johnson
3 Gerald D. Johnson
4 PO Box 4448
Carmel, CA 93921

EHP

Chambers of U.S. Magistrate Judge
Patricia V. Trumbull

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